

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARVIN D. LANG)	
Claimant)	
VS.)	
)	
OKMAR OIL COMPANY)	Docket No. 155,777
Respondent)	
AND)	
)	
ST. PAUL FIRE & MARINE INSURANCE COMPANY)	
Insurance Carrier)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

On December 3, 1996, the application of respondent for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge Bruce E. Moore on June 10, 1996, came on for oral argument by telephone conference.

APPEARANCES

Claimant appeared personally and by and through his attorney, Scott J. Miller appearing for John T. Bird of Hays, Kansas. Respondent and its insurance carrier appeared by and through their attorney, Richard J. Liby of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, Edward D. Heath, Jr., of Wichita, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

- (1) What is the nature and extent of claimant's injury and/or disability, if any?
- (2) Claimant's entitlement to future medical treatment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

The Appeals Board finds that the Award of the Administrative Law Judge sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The findings and conclusions enumerated in the Award of the Administrative Law Judge are both accurate and appropriate and the Appeals Board adopts same as its own findings and conclusions as if specifically set forth herein as to the issues raised.

The significant dispute in this matter rests upon whether claimant's stipulated accident of June 16, 1990, resulted in an injury to claimant's left knee resulting in a scheduled injury or whether claimant's accident also aggravated his right knee resulting in a general body injury, entitling claimant to work disability.

The medical evidence consists of the deposition and records of Dr. Gregory A. Woods, the treating physician, and the deposition and records of Dr. John J. Wertzberger, the evaluating physician. The Administrative Law Judge found the testimony of Dr. Wertzberger, the more experienced of the two doctors, to be the more credible and adopted Dr. Wertzberger's findings that claimant placed additional stress on the right knee occasioned by favoring the left knee, thus aggravating or accelerating the arthritic condition in claimant's right knee. This additional aggravation necessitated medical treatment and subsequent surgical replacement of claimant's right knee. Dr. Wertzberger felt that the demands on the non-operated leg were much greater than on the operated leg during the recovery and rehabilitation period. It was also Dr. Wertzberger's opinion that the increased stress on claimant's right knee following the left knee replacement, particularly when taking into consideration claimant's preexisting arthritic condition and his long-term gait irregularity, combined to eventually lead to the necessity for claimant's right knee replacement. The Appeals Board agrees with the analysis of the Administrative Law Judge and, in this instance, finds the opinions of Dr. Wertzberger to be the more credible.

In so finding, the Appeals Board also finds it appropriate to adopt the functional impairment ratings of Dr. Wertzberger which result in a 23 percent permanent partial impairment to the body as a whole resulting from the bilateral knee replacement surgeries.

The Administrative Law Judge, after reviewing the expert testimony of Dona L. Wall and Stephen J. Burd, gave equal weight to the opinions of the two work disability experts. The Appeals Board has in the past on many occasions given equal weight to the opinions of conflicting experts absent some specific justification for accepting one opinion over that of another. There is no compelling reason for placing greater weight on the opinion of

either of the two work disability experts in this matter and as such the Appeals Board finds the Administrative Law Judge's Award, based upon the average of the opinions of both experts, is appropriate and claimant is granted a work disability of 77 percent.

In finding claimant suffered injury to his bilateral knees, the Appeals Board likewise awards claimant future medical for both knees upon application to and approval by the Director for both knees.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Bruce E. Moore dated June 10, 1996, should be, and is hereby, affirmed.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Marvin D. Lang, and against the respondent, Okmar Oil Company, its insurance carrier, St. Paul Fire & Marine Insurance Company, and the Kansas Workers Compensation Fund for a 77% permanent partial whole body work disability.

Claimant is entitled to 47 weeks of temporary total disability compensation at the rate of \$271 per week totaling \$12,737, followed by compensation at the rate of \$271 per week for a total award not to exceed \$100,000.

As of January 3, 1997, there is due and owing to claimant 47 weeks of temporary total disability compensation at the rate of \$271 per week totaling \$12,737, followed by 294.86 weeks of permanent partial disability compensation at the rate of \$271 per week totaling \$79,907.06 for a total due and owing of \$92,644.06, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance shall be paid for 27.14 weeks at the rate of \$271 per week totaling \$7,355.94 until fully paid or further order of the Director.

Future medical will be considered upon proper application to and approval by the Director.

Additional issues appealed to the Administrative Law Judge but not appealed to the Appeals Board are adopted herein insofar as the findings of the Administrative Law Judge are not inconsistent with the findings contained herein.

The contract for attorney fees between claimant and his attorney is approved insofar as it does not contravene the provisions of K.S.A. 1989 Supp. 44-536, and a lien is placed against the Award pursuant to K.S.A. 1989 Supp. 44-536.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent, its insurance carrier, and

the Kansas Workers Compensation Fund per the agreement of the parties, to be paid as follows:

Dolores Eilts, C.S.R. Deposition of Dr. Gregory Woods Dated October 24, 1991	\$516.75
Jay E. Suddreth & Associates Deposition of Dr. John Wertzberger Dated October 8, 1992	\$441.45
Owens, Brake, Cowan & Associates Deposition of Dona Wall Dated April 17, 1995	\$410.75
Deposition of Stephen Burd Dated December 6, 1995	\$237.00
Regular Hearing Transcript Dated December 6, 1995	\$248.58

IT IS SO ORDERED.

Dated this ____ day of January 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned respectfully dissents from the opinion of the majority. The significant controversy in this matter exists between the testimony of Dr. Gregory A. Woods, the treating physician who had the opportunity to examine and treat claimant for over two years, and Dr. John J. Wertzberger who had the opportunity to examine claimant on one occasion as a referral from claimant's attorney. The Appeals Board has held in the past that the opinion of the treating physician should generally carry more weight than that of a hired evaluator. The opportunity by the treating orthopedic surgeon to examine claimant's internal damage while performing the knee replacements gives the treating physician insight into claimant's degenerative process not available to a doctor limited to medical reports, examining the external results of the surgeries, and listening to claimant's history and symptoms. The claimant's left knee, damaged by the fall on June 16, 1990, is compensable for purposes of this Award. While there was some degenerative process ongoing in the left knee the examinations indicate that claimant also suffered a traumatic injury to the knee. In particular, there was indication that a piece of the cartilage had been knocked off the surface of the lateral femoral condyle. Dr. Woods felt this was the result of traumatic injury, making the knee compensable.

The examination of the right knee, however, resulted in findings of significant degenerative arthritis, bone-on-bone articulation indicating the cartilage had been completely worn away, and a leg-length discrepancy which, when combined with claimant's obesity, indicated to Dr. Woods that claimant had, for a significant period of time, placed additional stress on his right leg as a result not of an injury at work or from the subsequent treatment but rather from the degenerative process combined with claimant's physical makeup and long history of knee problems. These facts, when combined, convince this board member that claimant's right knee is not related to the injury of June 16, 1990, nor to the subsequent treatment provided claimant for the left knee problem.

Dr. Woods, as the treating physician, had the opportunity to observe claimant over a significant period of time. This adds credence to his opinion testimony. Dr. Wertzberger had the opportunity to examine claimant on one occasion and did not have the opportunity to internally inspect the damage suffered to claimant's right knee. It is further significant that claimant's right knee problems predated by at least three years the June 1990 injury. In 1987 claimant was diagnosed with degenerative knee problems and sought treatment at that time. It was noted that claimant's right leg was approximately one inch shorter than his left leg which caused a long-term irregular gait, something claimant had always had. Both medical experts agreed that this condition would put more stress on the shorter leg causing compression of the lateral joint and producing a laxity in the internal ligaments in claimant's right knee. Dr. Wertzberger agreed with Dr. Woods that this was a contributing factor in claimant's need for surgery. The experts also agreed that claimant's 270-pound weight exacerbated the effects of this condition adding to the problems associated with claimant's right knee. Dr. Woods felt that claimant's right knee surgery was necessitated by claimant's long-term degenerative condition rather than any injury to the left knee.

Additional concern is raised regarding the understanding of both Dr. Wertzberger and the Administrative Law Judge as to the amount of time claimant spent on crutches. Dr. Wertzberger indicated in his testimony that claimant was continuously on crutches subsequent to the June 1990 injury. Likewise the Administrative Law Judge, in the Award, indicated both that claimant was on crutches continuously from July 25, 1990, through January 7, 1991, and that claimant was on crutches for six straight months. Neither of these observations is supported by the record. Dr. Woods testified claimant was on crutches for approximately six weeks after the injury and again for approximately six weeks after the knee replacement surgery. Two six-week periods on crutches with a significant period of time in between does not constitute six straight months on crutches as was indicated in the record. This misconception on the part of both Dr. Wertzberger and the Administrative Law Judge casts doubt upon the accuracy of the opinions expressed regarding what, if any, exacerbations or aggravations occurred as a result of claimant's ongoing treatment.

In workers compensation matters it is claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence. See K.S.A. 1989 Supp. 44-501 and K.S.A. 1989 Supp. 44-508(g).

In this instance this board member feels claimant has failed in proving that the right knee degenerative process was related to the injury suffered by claimant on June 16, 1990, and claimant's award should be limited to a scheduled injury to the left knee only.

BOARD MEMBER

c: Scott J. Miller, Hays, KS
Richard J. Liby, Wichita, KS
Edward D. Heath, Jr., Wichita, KS
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director